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No. 79-1009

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARRY ALEMAN and LEONARD FORESTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 609 F.2d 298.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1979. On November 21, 1979, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 28, 1979 (Pet. App. 27), and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" that is in or affects interstate commerce and is conducted through a pattern of racketeering activity, extends to participation in illicit ventures as well as participation in legitimate businesses.

2. Whether separate sentences can be imposed for participation and conspiracy to participate in a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and (d), and for the underlying illegal acts of racketeering activity.

3. Whether the district court erred in refusing to sever two counts charging petitioner Foresta with transporting and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1), or in allowing the government to introduce evidence of Foresta's prior conviction, despite his proffered stipulation.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d), and interstate transportation of stolen property, in

violation of 18 U.S.C. 2314. Petitioner Foresta was also convicted of transporting a firearm in interstate commerce to commit a felony, in violation of 18 U.S.C. 924(b), carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2), transporting a firearm in interstate commerce as a convicted felon, in violation of 18 U.S.C. 922(g), and possessing a firearm in interstate commerce as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1).[1] Petitioners were each sentenced to concurrent terms of 20 years' imprisonment on the racketeering counts, and to a consecutive term of 10 years' imprisonment on the stolen property count. Petitioner Foresta was also sentenced to two 10-year terms and two two-year terms on the firearm counts; these sentences were concurrent with one another and with the sentences on the other counts. The court of appeals affirmed, one judge dissenting (Pet. App. 1-25).

With respect to the racketeering counts, the indictment charged that petitioners had been part of an enterprise of "a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and to divide among themselves the stolen goods and all proceeds derived therefrom," and that this enterprise had been conducted through "a pattern of racketeering activity * * * [involving] the commission of robberies in Chicago, Illinois, Oak Lawn, Illinois, and Indianapolis, Indiana" (Pet. App. 5). The evidence presented at trial, the sufficiency of which is not disputed, showed that in 1972 and

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[1] Petitioner Aleman was acquitted on two firearm counts.

1973 petitioners and others committed a series of robberies of homes located in Illinois and Indiana.[2] The robbers operated from a private club in Chicago known as the Survivor's Club and selected homes they believed contained large amounts of cash or other valuable property (Pet. App. 3-5).

The first robbery occurred on September 16, 1972, at a home selected by petitioner Aleman in Oak Lawn, Illinois. Petitioner Foresta and unindicted co-conspirator Almeida carried out the crime after Aleman gave them the keys to a stolen car and the address of the target home. Foresta and Aleman threatened the owner and babysitter who was also present. After searching the house for about 30 minutes and collecting cash and jewelry, the two robbers returned to the Survivor's Club. Aleman paid Foresta and Almeida $500 each for their participation in the robbery (Pet. App. 3).

The second robbery occurred in January 1973 at a doctor's home in Indianapolis, Indiana. Aleman provided Foresta and Almeida with a sheriff's badge to be used as a ruse to gain entry. He also advised them to carry weapons. Foresta and Almeida went to Indianapolis, stopping as planned at the residence of a friend of Aleman's who took them to the target home. Using the sheriff's badge, Foresta and Almeida pushed their way in past the maid, who was then threatened with a gun and tied up. After about an

[2] One of these other participants, unindicted co-conspirator Louis Almeida, testified for the government at petitioners' trial (Pet. App. 3).

hour, Foresta and Almeida left with approximately $35,000 worth of jewelry, furs, and cash, and returned with those items to Aleman's house in Chicago. Aleman again paid Foresta and Almeida $500 each (Pet. App. 4).

The third robbery occurred in November 1973, when Aleman, Foresta, Almeida, and another man, again using the ruse of the sheriff's badge, gained entry to a home in Chicago, Illinois. They struck the owner in the head with a gun and bound him and his wife. The robbers then ransacked the house for nearly an hour and left with property valued at about $6,500 (Pet. App. 5).

ARGUMENT

1. Petitioners contend (Pet. 10-20) that their criminal partnership is not an "enterprise" as the term is defined in 18 U.S.C. 1961(4) and employed in 18 U.S.C. 1962-1964. In support of this contention, they rely upon *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979), in which it was held that the term "enterprise" includes only legitimate ventures and not associations or organizations established solely for unlawful purposes. The Sixth Circuit, however, has granted the government's petition for rehearing en banc in *Sutton* and vacated the panel's opinion.[3] Since all other courts of appeals to consider the issue have agreed with the court below that the statute encompasses illegal enterprises, there is presently no conflict

[3] The Sixth Circuit's order is reprinted in the Appendix, *infra*.

requiring resolution by the Court.[4] Moreover, for the reasons stated in our Brief in Opposition in *Little* v. *United States*, No. 79-5013 (filed Aug. 23, 1979),[5] we submit that Section 1962 reaches not only legitimate businesses or operations, but also informal associations of individuals engaged in illegal activities. Accordingly, the court of appeals properly affirmed petitioners' racketeering convictions (Pet. App. 5-13).[6]

2. Petitioners claim (Pet. 21-22) that their separate sentences for the Section 1962 offenses and for

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[4] In addition to the Seventh Circuit in the instant case, the Second, Third, Fifth, Ninth, and District of Columbia Circuits have taken the opposite view from that of the panel in *Sutton*. See *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *Manchester* v. *United States*, 605 F.2d 1198 (3d Cir. 1979) (table), petition for cert. pending, No. 79-656; *United States* v. *Elliott*, 571 F.2d 880, 896-899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Rone*, 598 F.2d 564, 568-569 (9th Cir. 1979), petition for cert. pending *sub nom. Little* v. *United States*, No. 79-5013; *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979).

[5] We are sending petitioners' counsel a copy of our submissions in *Little*.

[6] Petitioners assert (Pet. 18-21) that the statute as construed by the court of appeals would be unconstitutional. This assertion is insubstantial. The statute gives adequate warning of its prohibitions to allow individuals to conform their conduct to the requirements of the law; as the court of appeals observed (Pet. App. 12), "[b]eing broad in scope is not synonymous with being vague." Nor is the statute invalid because it leaves to the discretion of the prosecutor the selection of an appropriate charge in each case. See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 8-11.

the underlying illegal acts of racketeering violated the Due Process and Double Jeopardy Clauses. This claim is without merit.

a. Petitioners first contend that imposition of consecutive sentences on the counts of racketeering and of transportation of stolen property violated the Double Jeopardy Clause because the latter offense was incorporated in the indictment as an act of racketeering activity. This contention is similar to the issue presented in *Whalen* v. *United States*, No. 78-5471 (argued Nov. 27 and 28, 1979): whether the Double Jeopardy Clause prohibits the imposition of cumulative sentences for offenses with different statutory elements, where one of the offenses has as an element the commission of any of a class of other offenses. In *Whalen*, the defendant was convicted of felony murder (which required proof of the commission of one of several enumerated felonies) and of the underlying felony of rape. Here, petitioners were convicted of racketeering offenses (which required proof of two or more acts of racketeering activity) and of the stolen property offense that constituted one of the underlying acts of racketeering. For the reasons set out in the government's Brief in *Whalen*,[7] we submit that the Double Jeopardy Clause does not bar petitioners' consecutive sentences for racketeering and interstate transportation of stolen property.[8]

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[7] A copy of the government's Brief in *Whalen* is being sent to petitioners' counsel.

[8] We note that the court of appeals correctly held (Pet. App. 14) that Congress intended cumulative sentences to be

In any event, the enterprise involved in the racketeering convictions requires proof of only two acts of racketeering activity (18 U.S.C. 1961(5)). Since the evidence at trial showed three acts of racketeering (the three robberies), the stolen property count did not have to be proved in order to establish the existence of an enterprise; hence, the stolen property count was not a "lesser included offense" of the racketeering charge, and thus the consecutive sentences would not violate the Double Jeopardy Clause regardless of the outcome in *Whalen*. Accordingly, this case need not be held pending disposition of *Whalen*.

b. Prior to this prosecution, petitioner Foresta was convicted and sentenced in state court for the Indianapolis robbery, which was one of the acts of racketeering alleged in the counts under Sections 1962(c) and (d).[9] In addition, the items taken during that crime constituted the stolen property involved in the Section 2314 offense. Based on these facts, Foresta contends (Pet. 21) that he was improperly sentenced four times for a single offense.[10] As the court of appeals held (Pet. App. 19), however, this contention is baseless since "different sovereignties [are] involved."[11] See *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959).[12]

3. Petitioners contend (Pet. 22-23) that the district court erred in refusing to sever the two counts charging petitioner Foresta with transporting and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1).[13]

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available for the racketeering offense and the offenses that compose the underlying acts of racketeering activity.

[9] Foresta's state sentence was 18 years' imprisonment (Pet. 21 n.*). Advance authorization for this federal prosecution was obtained from the Assistant Attorney General for the Criminal Division under the Department of Justice's *Petite* policy.

[10] Foresta contends that his multiple sentences violated both due process and double jeopardy principles. The constitutional protections against multiple convictions and sentences for the same conduct, however, are embodied in the Double Jeopardy Clause. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Cf. *Ashe* v. *Swenson*, 397 U.S. 436, 442, 445 (1970); *Abbate* v. *United States*, 359 U.S. 187, 189-190 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 127 (1959).

[11] Foresta's claim (Pet. 21-22) that the dual sovereignty doctrine is inapplicable in this case because of "federal participation" in his state trial is meritless. Although it was recognized in *Bartkus* v. *Illinois*, *supra*, 359 U.S. at 123-124, that the dual sovereignty doctrine would not justify successive state and federal prosecutions where the state prosecution was merely a "sham" or "a tool of the federal authorities," no such situation occurred here. As the court of appeals observed (Pet. App. 19-20), "[t]hat an FBI Special Agent testified at Foresta's Indiana trial and a federal prosecutor was listed as a possible state witness [did] not alone turn the state trial into a sham." Cf. *United States* v. *Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978).

[12] In light of the dual sovereignty doctrine, it is unnecessary to consider whether petitioner Foresta's sentences were imposed for the same offenses. However, as the court of appeals held (Pet. App. 19), and as discussed more fully in our Brief in *Whalen*, *supra*, we submit that the federal and state offenses were separate and distinct under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932).

[13] Petitioners do not dispute that joinder of the counts in question was appropriate under Fed. R. Crim. P. 8(b), since

Alternatively, they contend that the district court should have permitted Foresta to stipulate to his prior conviction rather than allowing the government to introduce evidence of that conviction. These contentions are unavailing.

The proper disposition of a request for a severance is within the discretion of the district court, and the denial of a severance will be reversed only for an abuse of that discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); Notes of the Advisory Committee on Fed. R. Crim. P. 14. As Professor Wright has summarized (C. Wright, *Federal Practice and Procedure: Criminal* § 227, at 468-469 (1969) (footnotes omitted)):

> If the claim is, however, that a joinder, permissible under Rule 8, is nevertheless prejudicial, and that relief should be granted under Rule 14, the matter is addressed to the discretion of the trial court and a conviction will be reversed only if the refusal of the trial court to grant relief was a clear abuse of discretion. * * * The burden is on the defendant to make an affirmative demonstration that his rights to a fair trial have been prejudiced by the joinder, and refusal to grant a severance will be affirmed even if the circumstances are such that a grant of severance would have been sustainable.

The district court did not abuse its discretion in denying a severance in this case. The gun at issue in the firearm counts was also evidence of an act of

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these charges were based on acts related to the racketeering activities alleged in the racketeering counts.

racketeering activity charged in the substantive racketeering offense, and transportation of that gun was one of the overt acts alleged in the racketeering conspiracy. There was no abuse of discretion in deciding to try the offenses together rather than duplicating much of this proof in two separate trials (Pet. App. 22).

Nor have petitioners demonstrated any prejudice from the denial of a severance. Indeed, the possibility of prejudice was minimal in this case. No details of Foresta's prior robbery conviction were elicited, nor was it disclosed that the conviction was for robbery by assault (Pet. App. 22). The jury was instructed that Foresta's prior conviction should not in any way be considered as evidence of his guilt on the present charges and that it should give separate consideration to the evidence against each defendant and to each count (*ibid.*).[14] And, as the court of appeals noted (*ibid.*), "[t]he circumstances of this case do not suggest that the jury disregarded the court's instructions." See *Lakeside* v. *Oregon*, 435 U.S. 333 (1978); *Opper* v. *United States*, *supra*, 348 U.S. at 94-95. Accordingly, there is no basis for concluding that the district court abused its discretion in denying a severance. See *United States* v. *Roe*, 495 F.2d 600, (10th Cir. 1974); *United States* v. *Abshire*, 471 F.2d 116, 118-119 (5th Cir. 1972).[15]

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[14] Petitioner Aleman was in fact acquitted on two firearm charges (Pet. App. 2-3, 22).

[15] *United States* v. *Busic*, 587 F.2d 577, 585 (3d Cir. 1978), cert. granted on other issues, Nos. 78-6020, 78-6029 (June 4,

Finally, petitioners claim that the district court erred in not allowing Foresta to stipulate to his prior conviction. Since this argument was not raised in the court of appeals, it should not be considered here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, this Court has recently declined to review this issue in *Stevens* v. *United States*, cert. denied, 439 U.S. 846 (1978), and *Blackburn* v. *United States*, cert. denied, 441 U.S. 948 (1979), and there is no reason for a different disposition here.

In any event, petitioners' claim is without merit. Foresta was convicted of transporting and possessing a firearm in commerce as a convicted felon, in violation of 18 U.S.C. 922(g) and 18 U.S.C. App. 1202(a)(1). A prior felony conviction is therefore an essential element of the crimes charged. As a general rule, the government is not required to accept an offer to stipulate and is allowed to insist upon presenting proof as to all essential elements of the crime charged. See, *e.g.*, *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Kalama*, 549

1979), does not require a contrary result. *Busic* held that a defendant's pretrial motion to sever a count requiring proof of a prior conviction should be granted unless evidence of the prior conviction would be otherwise admissible. Petitioners do not rely on *Busic*, and, in our view, that decision is solely prospective in effect and thus does not aid petitioners. At all events, since the possibility that evidence of Foresta's prior conviction might have improperly affected the jury's verdict was minimized, this case does not present an appropriate occasion for the Court to consider any conflict between *Busic* and the decision below.

F.2d 594, 596 (9th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); *United States* v. *Burkhart*, 545 F.2d 14 (6th Cir. 1976); *United States* v. *Smith*, 520 F.2d 544, 548 (8th Cir. 1975), cert. denied, 429 U.S. 925 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

APPENDIX

Nos. 78-5134-5-6-7-8-9-41-2-3 and 78-5074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

vs.

CARL SUTTON, JR., ET AL.,

DEFENDANTS-APPELLANTS.

[November 7, 1979]

ORDER

A majority of the judges of this Court in regular service have voted for rehearing of these cases en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this court is [*sic*] vacated, the mandate is stayed and these cases are restored to the docket as pending appeals.

The Clerk will direct the parties to file supplemental briefs and the cases will be scheduled during the February, 1980 session.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
JOHN P. HEHMAN,
Clerk

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